No. 2486.

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY F. MARSHALL,
*Appellant,*

vs.

SAMUEL, W. BACKUS, as Commissioner of Immigration for the Port of San Francisco,
*Appellee.*

## BRIEF OF APPELLEE


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In the Matter of the Application of Henry F. Marshall for Writs of Habeas Corpus on Behalf of Thirty-five Hindus.

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## BRIEF OF APPELLEE.

In the case of Healy against Backus, No. 2436, decided March 18, 1915, by this Honorable Court, the facts were identical in almost every feature with those of this case, so there is no need of a discussion of the circumstances of the evidence. The sole question now to be determined is whether or not that opinion filed March 18, 1915, has fully answered all the contentions of coun-

sel on the points of law raised in this case. Counsel have not in their brief alleged that there was any unfairness in the immigration proceedings in the matter of according the aliens and their attorneys all the rights and privileges afforded them by the immigration laws, nor have counsel contended that there was an abuse of discretion on the part of the Secretary of Labor because of any insufficiency of evidence upon which to base his findings. To state it briefly:

Counsel's main objection to the warrants of deportation is based on the ground that the law is inadequate to meet such a set of circumstances, or, in other words, that the interpretation of the immigration laws does not permit the expulsion of these particular aliens. The reasons for the attack on the law were briefly summarized under five topical headings on page 4 of counsel's brief and will be discussed in the order there adopted.

## I.

## WAS THE LANDING IN THE PHILIPPINE ISLANDS EQUIVALENT TO ADMISSION INTO THE MAIN LAND OF THE UNITED STATES?

That point is fully covered by the opinion of this court in the case of Healy against Backus, No. 2436, in which Judge Wolverton said:

> "It will be seen that the previous Rule 14 treated aliens once admitted to the Philippines as entitled to admission to the main land upon identification

without further examination. The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the main land when much likelihood would not exist as to them in insular possessions, and hence they are subjected to further examination upon their entry at continental ports.

"It might well be that aliens would be likely to become public charges on the main land when such would not be the case with them were they to remain in the insular possessions, such as Porto Rico, Hawaii, or the Philippines, where the labor and climatic conditions are essentially different, where the habits of the people, their modes and standards of living, and their environment are in a marked degree dissimilar.

"It is apparent that the same tests for discovering and determining the likelihood of becoming public charges would not be as applicable or as efficacious in the one case as in the other. So that there exists a potent reason for the adoption of the rule requiring additional examination where aliens have been manifested in these insular possessions and go on certificate to the main land."

## II.

## MAY THE SECRETARY OF LABOR REVIEW THE DECISION OF THE PHILIPPINE ISLAND OFFICIALS?

It is claimed that the Commissioner-General of Immigration exceeded the authority granted him under Section 22 in promulgating Rule 14 with the last amendment which provides for the examination of aliens com-

ing from the Philippine Islands. Counsel state that Rule 14 is "inconsistent with the law" for the reasons briefly enumerated but not discussed upon page 12 of their brief. These contentions can not be upheld. In the Government's brief, pages 51 to 54, inclusive, in the case of Healy v. Backus, No. 2436, is set forth an argument and authorities on these points. That this Honorable Court sustained the Government's contention is indeed evident when Judge Wolverton in his decision said:

> "The power of the Commissioner-General for adopting rules and regulations for carrying the provisions of the Immigration Act into effect is very broad, and if it be, as we have said, it might well be that persons would not be likely to become public charges in insular possessions, or certain of them, while they would be likely to become public charges on the continent, why is it not a reasonable and perfectly natural exercise of that power to admit such persons to the insular possessions on condition that if they proceed to the main land they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the Act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Congress. *The admission to the insular possessions under the amended Rule 14 is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission.* * * *
>
> "Such new and revised regulation, we are impressed, was not a violation therefore of any vested rights of the petitioners, and the inquiry would still

> remain whether they would be likely to become public charges on the continent, having relation under the amended rule to the time of their admission to the Philippines."

If a mistake was made by the immigration officials, who worked in conjunction with the Customs Service and under the supervision of the War Department, in landing these aliens in the Philippine Islands, surely the mistake can be rectified. If an alien is mistakenly landed on the main land of the United States and later the error is brought to light and it is found that the alien had certain latent defects, physical or mental, the alien may be arrested and expelled and the error thereby corrected.

The Courts have decided in two very clear-cut opinions that the immigration officials may arrest and expel aliens whom they had mistakenly admitted and who were members of the excludable classes at the time of entry. These cases, Pearson v. Williams, 202 U. S. 281, and The Japanese Immigrant Case, 189 U. S. 87, held that the decisions admitting or landing aliens are not matters res adjudicata and are subject to reversal upon a hearing to correct errors of judgment. See also United States v. Williams, 175 Fed. 275.

If the Secretary of Labor may rectify a previous mistaken admission into the main land of the United States surely he can correct the error of admission into an insular port. It should be noted, however, that there is no attempt to review the decision of the Philippine Island officials in the sense contended for by counsel on page

8 of their brief since the officials located there are responsible to some department other than the Department of Labor, but these alien Hindus voluntarily removed themselves to a territory under the jurisdiction of the Secretary of Labor.

In the Philippine Islands the proper immigration officials' decision is conclusive anywhere within the jurisdiction of their geographical territory, but with the removal of these aliens to the United States and their coming within a territorial jurisdiction of the Secretary of Labor, the authority of the ruling of the Philippine Island officials ceased.

It is apparent that counsel have not answered Judge Dooling's statement when in his written opinion in deciding this case in the District Court he said:

> "I am satisfied, therefore, that the action of the authorities at Manila is not conclusive upon the immigration officers on the main land, and while the law is, in its present form, very uncertain and unsatisfactory, I am of the opinion that whether we call it exclusion or expulsion, the immigration officers may prevent the entry to the main land of aliens who have heretofore been permitted to land at Manila for any reason which would lawfully operate to prevent their landing here, in the first instance, if they had never gone near the Philippines; if they so have the power to exclude, as the aliens appear to have had a fair hearing, the fact that this was done under a Warrant of Arrest is immaterial."

## III AND IV.

## IS THE DECISION OF THE SECRETARY OF LABOR FINAL IN AN EXPULSION CASE AS WELL AS IN AN EXCLUSION PROCEEDING?

It is admitted that the proceedings in this case are in the nature of *expulsion* since the aliens were arrested under warrants emanating from the Secretary of Labor, but when counsel attempt to make a distinction between the proceedings by claiming that in exclusion cases the ruling of the Secretary of Labor is final and in expulsion cases his decision is not final, this distinction is an explanation not founded on reason.

For their authority in sustaining their attempted distinction, they cite Redfern against Halpert, 186 Fed. 150, 108 C. C. A. 262, in which there is one sentence which reads as follows:

> "I find nothing in the law making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case."

A careful reading of that decision will show that the all important matter before that court was the question of the three-year limitation in expelling aliens from the United States and that the judge could never have ruled that the court should in expulsion cases usurp the powers of the Secretary of Labor. That case is an isolated opinion which has never been followed and is directly contrary to all Supreme Court decisions. It is absurd

to argue that Congress intended that in expulsion cases the courts should transform themselves into an immigration bureau and rehear all the evidence. If the Secretary of Labor is a mere figurehead and his rulings on questions of fact can not be final, and his prerogatives and powers are to be taken over by the courts, then his functions are useless and his office should be abolished.

Counsel cite a number of *exclusion* cases in which they admit that the court's decision is final and conclusive, but in that list they fail to set forth the *expulsion* cases which have also determined that the ruling of the Secretary of Labor shall be final.

The Japanese Immigrant Case, 189 U. S. 87, is an expulsion case in which the alien woman was arrested upon a warrant from the Secretary of Labor. When the case came up to the Supreme Court on appeal from an order denying the writ of habeas corpus, Justice Harlan said:

> "*Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the Government, and that the order of executive officer invested with the power to determine finally* the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency.' Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. Ed. 1146, 1149, 12 Sup. Ct. Rep. 336; Fong Tue Ting v. United States, 149 U. S. 698, 713, 37 L. Ed. 905, 913, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 547, 39 L. Ed. 1082, 1085, 15 Sup. Ct. Rep. 967."

It is a basic principle that the rulings on questions of fact by the executive officials of the immigration bureau on either exclusion or expulsion is final and not subject to judicial review. This principle was early expressed in Fong Tue Ting against United States, 149 U. S. 697.

> "*The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers;* or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. * * *
>
> "It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of Acts of Congress, *to submit the decisions of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.*"

Judge Seaman expressed a similar opinion on the finality of the ruling of the Secretary of Labor in the expulsion proceeding in the case of Prentis against Di Giacomo, 192 Fed. 467:

> "We believe the rule to be settled, however, under these congressional enactments, that their enforcement against aliens is vested exclusively in the designated executive department, for hearing, ascertainment of the facts, and rulings thereupon, 'without judicial intervention;' that Congress has so provided, within its powers, not only in respect of control over the alien at the time of landing for entry, but of like control during the probation period

> fixed by the act for ascertaining whether the entry was lawful, to direct and enforce deportation when the entry is found to be unlawful; *and that the executive finding and order thereupon is not subject to judicial review or intervention, through the writ of habeas corpus or otherwise, except for failure or denial of the administrative hearing intended by the act.*"

In Frick against Lewis, 233 U. S., 289, 58 L. Ed. 967, in which case the alien was expelled from the United States under a warrant proceeding on a charge under which the trial jury had acquitted the alien, the Supreme Court ruled that the Secretary's finding of fact against the alien was final and conclusive.

> "Upon appeal, the Circuit Court of Appeals reversed this judgment (115 C. C. A. 493, 195 Fed. 693), holding that the power to deport an alien existed under Sections 2 and 21 of the act, irrespective of Section 3; and further that the right to deport in this case could be found in Section 3 in connection with Section 21, without regard to conviction or acquittal under Section 3. The court also held that the acquittal of Lewis was not res adjudicata of the present proceeding, and that *since there was evidence tending to support the finding of the Secretary of Commerce and Labor respecting the bringing in of the woman for the purpose of prostitution, that finding was conclusive.*"

## V.

## DO THE WARRANTS STATE A CAUSE FOR EXPULSION UNDER THE IMMIGRATION LAWS?

The argument of counsel that the warrants of deportation are defective because they do not comply with

the wording of the footnote to Rule 22 found on page 37 of the Immigration Rules and Regulations is ingenious but by no means convincing. It is unsupported by any authority and will not stand a critical analysis. Counsel's definition of those deemed to be unlawfully in the United States is made under a misapprehension of the meaning of Rule 22. Paragraph (3) of the footnote does not purport to be a limitation, but a definition. In other words, those who may be found here illegally are those specified in Sections 3 and 18, but by no reasonable construction could it be held as asserted by counsel on page 25 of their brief, that those are the only aliens who may be deported after once being admitted into the United States.

That an alien is in the United States "in violation of law" because he is likely to become a public charge does not mean that the immigration officials must wait until he has *actually* become a public charge. If he is likely *ever* to become a public charge, whether in one year or in twenty years, and he had latent defects, physical or mental, at the time of his entrance which now indicate such a possibility, he is here in violation of law.

The provision of Section 30 which states "and such as become public charges from causes existing prior to landing" is the basis for the petitioner's contention that the law does not authorize or empower *expulsion* until the alien has gone beyond the stage of likelihood.

Can it be conceived that the apparent intent of Congress should be defeated because in making such provision in Section 20 it did not specifically mention the

class of those *likely* to become a public charge? All the sections of this Act must be read together, not merely Sections 2, 20 and 21 and Rule 22 with its footnote, but all from and including 1 to Section 25 of the entire act. In Section 21 there is a provision as follows:

> "In violation of this Act" (meaning the act as a whole) "or *any* law of the United States."

Is it not clearly a violation of this *Act* or *any* law if an *excludable* alien, namely, one likely to become a public charge under Section 2, has been mistakenly and through manifest error permitted to land in the United States, to say that an alien who was likely to become a public charge at the time of entry can not be deported merely because he has not yet *become* such, and because if he had, or should within three years, he can be deported on that ground alone, seems to be a refinement of reasoning not justifiable in construing and applying remedial statutes such as the immigration laws. It is only by reasoning along lines similar to the foregoing that a meaning can be assigned each provision of Sections 20 and 21. As a matter of fact, said sections were not new legislation when they were enacted so far as they contemplated the *expulsion* of aliens on the ground that they were likely to become public charges at the time of entry, but were merely a re-enactment of already existing legislation and the placing of the law in more emphatic form than it had previously stood. When the Act of 1907 was passed the practice of arresting and expelling aliens on this ground had been continued for some time. This practice had prevailed in cases in which

aliens deemed likely to become public charges were arrested soon after being landed even before the passage of the Act of 1903. This last assertion is supported by no less evidence than the statement of facts in the Japanese Immigrant Case, 189 U. S. 86-87, which related to a Japanese woman arrested in 1901 after she had entered the country, one of the charges against her being "likely to become a public charge." In that case the action of the administrative officers was upheld by the Supreme Court and the decision has repeatedly been cited since in support of numerous propositions arising under this phase of the immigration law.

The Acting Commissioner-General, in an opinion rendered recently in discussing this point, said:

> "Unless the statute is given the construction above contended for, a considerable nullification of its provisions would result—a large class of aliens that the law clearly intends shall not be permitted to enter or remain could not be removed, and after staying for three years could become public charges and still be immune from expulsion, although their maintenance would be a public burden. To state an extreme, but by no means impossible illustration: Suppose an alien is admitted today, the inspector or the board concluding that he is admissible, and tomorrow there should be brought to the Secretary's attention evidence clearly indicating that such alien was all the while likely to become a public charge; must the Secretary wait, possibly almost three years, for his conclusion to be borne out by the alien's *actually become a public charge,* before he can start proceedings for his removal, and lose the right to remove if he does not become such until the three years have expired? The mere statement of this

supposititious case reduces the contention to such an absurdity as not to be countenanced in construing a statute of police and public security like the immigration law, which by all canons of construction is to be construed liberally to effect its purpose. (Japanese Immigrant Case, 189 U. S. 96, 97.)''

Respectfully submitted,

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